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ABSTRACT

With the basic assumption that reduction in force is inevitable, this paper discusses the legal ramifications as well as an orderly procedure for implementing reduction in force. Recent litigation with regard to reduction in force action falls in the broad categories of constitutional questions, statutory law, and contract provisions. Constitutional issues may result whenever an attempt to use the reduction in force procedures to remove unwanted employees can result in the infringement of procedural and substantive constitutional rights. However, most litigation and reduction in force procedures fall within the category of statutory issues. These include the issues of seniority and tenure, legal qualifications, hearing rights, sufficiency of evidence warranting actions, and call-back rights. Concerning the issue of contracts, boards of education need to be sensitive in providing for the possibility of staff reductions to include special provisions in the individual employment contract. As a model, the Phoeniz Union High School District reduction in force procedures for classified employees and administrative personnel are summarized.
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REDUCTION IN FORCE -- IS YOUR BOARD PREPARED?

Mary K. Carr

A young Ph.D. science teacher of three years stood before the Board of Education. With notice of termination in his hand, he asked the Board, "Why me?"

This young man was representative of 110 teachers, 10 administrators, and 150 classified employees who were issued notices of termination as a result of economic and declining enrollment conditions, and would be reduced in force for the coming school year. Many of these people have devoted a lifetime to preparing themselves for the specific jobs they had in the school district, and now found themselves without employment.

This scene is not unusual for districts across the nation -- districts who are confronted with the complexity of declining enrollment, lack of financial support, and spiraling inflationary cost. The question each of us have to ask as Board members is, "Is your Board prepared to meet the unpleasant task of reduction in force?"

Sensing the amount of time that I have to share with you today, I will not discuss with you the emotional and social traumas that reduction in force brings. All of us could provide testimonials to the effect that this is a most unpleasant and distasteful activity that we have as Board members.

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Rather, with the basic assumption that reduction in force is inevitable, my service to you today will be to discuss the legal ramifications as well as an orderly procedure for implementing reduction in force.

LEGAL IMPLICATIONS

When considering the legal implications, we must summarize the major factors necessitating reduction in force decisions. Sometimes overlooked in literature are reduction in force actions of the 1960's. At that time, court-mandated desegregation produced a surplus of personnel in many school districts which had formerly maintained a dual system. Court cases growing out of the situation are still in litigation.

It is interesting to point out the major causes of reduction in force which has as its basis the effects of the post World War II baby boom, whereby schools moved into the present decade and experienced declining enrollment. Obviously, when the student population of a district continues to decrease, eventually a teacher surplus occurs. Also, since state funding is typically provided on a pupil basis, districts with declining enrollment are proportionally allocated less money for operating.

At the same time, budget reductions are resulting from so-called taxpayers' revolts. The defeat of school tax levy proposals is illustrative of this. However, more dramatic and far-reaching expression is voter approval of Proposition 13 and similar property tax cut provisions in other states.

Finally, school districts including those with reduced revenues must cooperate with the ever-increasing costs produced by economic inflation. Because employees' salaries represent the greater portion of a school's operating budget, the alternative is likely to be reduction in force. Recent litigation with regard to reduction in force action falls in three broad categories: (1) constitutional questions, (2) statutory law, and (3) contract provisions.

First, in discussing the constitutional issues pertaining to reduction in force, one is reminded of the sensitivity with regard to racial discrimination. The courts make frequent use of the criteria detailed in Singleton vs. Jackson Municipal Separate School District. According to the criteria, school districts under court-ordered desegregation are obligated to develop objective nondiscriminating standards prior to making staff reductions.

I must underscore court ordered, because this shields the district from providing for protected classes without violating discriminatory actions. There still remains some confusion with regard to implementing the "Singleton formula" when making provisions to protect ethnic minority staff members in a school district.

For example, in Ayers vs. Western Line Consolidated School District, the court reviewed a claim by employees that they were not rehired, in violation of the 1st and 14th Amendment rights and Singleton standards. The number of counselors in the district had been reduced from 3 to 1, and one plaintiff's position had been abolished. Although the court rejected the constitutional rights claim, it

remanded the case to the lower court to determine whether the reduction in positions was related to desegregation.

The National Education Association sued the Selma, Alabama, School Board in 1970, charging that it had demoted and dismissed black employees in violation of Singleton requirements. Two years later the Board attempted to formulate acceptable standards, but found itself in court again in 1975. Their standards were rejected in part because of their subjectiveness. One of the employees, a former principal of an all-black high school, was appointed junior high school principal in 1970 and remained in that position until 1977. A principalship opened in 1975, but the Board did not promote him. In a 1976 ruling on the 1970 complaint, the court found the Singleton violations and ordered the district to assign the individual as a principal with back pay for one year. On an appeal, the 5th Circuit Court modified the award to include back pay from the time of initial transfer. The court indicated that Singleton standards require a Board to choose definite principles that it will implement in staff reductions and make the principles publicly known, and then apply those principles if reduction should occur.

The 4th Circuit Court imposed the equivalent of Singleton standards in ruling on a civil rights action also brought by a demoted and discharged black principal. The court said, "A school system cannot displace black faculty merely because the black schools are closed or integrated as a part of a plan for desegregation. If the plan reduces the number of positions, the school system must consider all faculty on the basis of objective, racially neutral criteria for the remaining positions." Therefore, the court ordered the Board to

consider the plaintiff's immediate reinstatement to principalship. However, if the employee was found to be less qualified than other employees of the district who were candidates, he was to be placed in the next vacant principalship.

Other constitutional issues may result whenever an attempt to use the reduction in force procedures to remove unwanted employees can result in infringement of procedural and substantive constitutional rights. In a recent case, Unified School District No. 480 vs. Epperson, the 10th Cirtuit Court considered the appeal of two teachers whose contracts were not renewed due to budgetary cuts necessitated by a decrease in school enrollment with a corresponding decrease in state aid. The teachers claimed that the actual reason for the dismissal was their activities in the Kansas National Educational Association. Although the Trial Court found no 1st Amendment violations, it did agree that the teachers had a property interest, which gave each a right to a hearing. The Appellate Court affirmed this determination and held that the lower court erred in not granting monetary damages.

Therefore, my friends, as Board Members, we must always be mindful of the constitutional implications of reduction in force, keeping in mind the decisions with regard to the Singleton case as well as the 1st and 14th Amendments.

Moving to the next category - statutory issues - as you might anticipate, most litigation and reduction in force procedures fall within this grouping. There are specific state statutory provisions

pertaining to "layoffs" of personnel in some states. In others, a reduction in force action must be implemented within the legal framework of nonrenewal of contract and dismissal. Collective bargaining statutes also represent an important consideration. Right or wrong, most reduction in force statutes utilize a "seniority system." In the state of Missouri, for example, "Whenever it is necessary to decrease the number of employees because of insufficient funds, or decrease in enrollment, or lack of work, the Board of Education may consider the necessary number of employees beginning with those serving probationary periods to be placed on leave of absence without pay, but only in inverse order of their employment."

The State of Arizona, through its revised statute 15-257, states, "Nothing in this article shall be interpreted to prevent a school board from reducing salaries or eliminating teachers in a school district in order to effectuate economies in the operation of the district or to improve the efficient conduct and administration of the schools of the district, but no reduction in the salary of a continuing teacher shall be made except in accordance with the general salary reduction in the school district by which he is employed, and in such case, the reduction shall be applied equitably among all such teachers. Notice of a general salary reduction shall be given each teacher affected not later than May 1 of the calendar year in which the reduction is to take effect. A teacher dismissed for reasons of economy or lack of pupils shall have a preferred right of reappointment in the order of original employment by the Board in the event of an increase in the number of teachers or the reestablishment of services within a period of three years." There

are no statutory provisions for any similar rights for administrators or classified employees!

Contrast the above provisions covering all other classes of districts with the following: "In placing teachers on leave, the Board of Education shall be governed by the following provisions:

1. No permanent teacher shall be placed on leave of absence while probationary teachers are retained in the positions for which a permanent teacher is qualified.
2. Permanent teachers shall be retained on the basis of merit within the field of specialization. . . ."

With the above observations in mind, it is not too difficult to anticipate the types of disputes that have come, and are continuing to come, before the courts. Most of the litigation concerns one or more of the following issues:

1. Seniority and tenure.
2. Legal qualifications.
3. Hearing rights.
4. Sufficiency of evidence warranting actions.
5. Call-back rights.

Research indicates that where state statutes require primary emphasis be accorded tenure and seniority in designating employees to be released, disputes frequently arise as to the affected individual's status. Great care has to be taken with regard to establishing seniority lists and the methods utilized in determining such lists -- for example, combining different departments such as Health, Physical Education, Dance, and Music into a single seniority list, whereas

a previous year you may have had separate seniority lists -- may defy explanation when you find yourself in court.

For example, in the State of New York, a teacher employed as an Instrumental Music Supervisor maintained that the Board incorrectly placed Instrumental and Vocal Music in separate tenure areas. Thus, when his position was abolished, his seniority entitled him to the Vocal Music Supervisor's position. The courts held that the Board had acted within its authority.

An appellate court also refused to order a school board to award seniority credit to part-time teachers, since the teachers were part-time of their own accord.

I might indicate that as Board members, you must authorize contracts which leave no doubt in the mind of the employee regarding their tenure status for part-time or full-time, or regarding loss of tenure status by accepting administrative positions, lest you find yourself in violation of a contract law.

In any event, another appellate court has ruled that seniority credit had been illegally denied, reversing a lower court judgment. The appellate court ruled that in a lay-off situation teachers were entitled to seniority credit for continuous substitute teaching service.

Similarly, the appellate court sustained the Commissioner of Education's decision that the Board had released the wrong principal. With the change in the state law, two principals attained

tenure at the same time. The Commissioner had ruled that the selection should be made on the basis of total service including that which they had served prior to the time they became eligible to attain tenure status. The appellate court held that the Board was within its authority.

Often seniority issues can be resolved only after a determination has been made of the employee's legal qualification to fill the position claimed. Oregon statutes, for example, do not permit the School Board to retain teachers lacking legal qualification and less seniority while dismissing permanent legally qualified teachers with more seniority. These provisions apply specifically to situations in which courses and positions were eliminated due to declining enrollment.

I could go on with additional illustrations with regard to the ramifications of state statutes, but suffice it to say that the most frequently used standard by which legal qualification is assessed is certification and the question of legal qualification with regard to teacher certification.

The most notable statutory right, as I have indicated previously, is with regard to the 14th Amendment and the right to due process in a reduction in force situation, particularly when the employee can establish a property interest in continued employment. In some states there is also a statutory right to notice and hearing.

For example, in Pennsylvania, a hearing is required for tenured teachers whenever personal or property rights are affected. The purpose of such hearings is to assure that the reasons for suspension or dismissal fall within statutory grounds, and that statutory procedures are followed.

Conversely, employees who have no enforceable expectation of continued employment which has been guaranteed by contract or statute have no right to a hearing.

The Phoenix Union High School District has moved towards a program of conditional employment during the winter and spring of the year to assist with the reduction in force statutory provisions. This conditional employment expressly states to the employees hired after January that they do not have an expected continuation of employment after June 30.

In all cases which involve statutory provisions, the Board of Education must be mindful of such requirements in order to effect a legal implementation of reduction in force procedures: specifically, appropriate notification, hearings if required, nondiscrimination, written procedures (Board policies), and sufficient evidence that the reduction in force has been effected as a result of objective criteria, and that the procedures do not hint at any type of punitive action by the administration or Board of Education towards an unwanted employee. Fairness in the procedures must be consistent for all classifications of employees.

Although the statutes protect primarily the continuing or tenure teacher, Boards of Education must also make provisions for reduction in force for other employee classifications such as classified and administrative. All procedures should maintain a preference for former employees suspended or dismissed because of reduction in force procedures when vacancies occur.

This may be illustrated best in a Pennsylvania case where a Business Education teacher was suspended in 1973 due to a decrease in enrollment. On two occasions, after deciding to offer an additional class, the Board had a vacancy notice placed in the teachers' lounge. In another instance, the Board notified the teachers, and for both classes the Board employed an instructor who was neither a regular nor suspended employee of the district. The teachers' association filed a grievance on behalf of the teachers, and an arbitrator held for the teachers. The court affirmed this determination that the Business Education teacher was entitled to an award equal to the salary she would have received had she taught the class.

However, some confusion can enter our minds when reviewing a Michigan case where an appellate court overturned the trial court order for the school district to conduct hearings prior to recalling teachers who were laid off because of reduction in force. The court said that rehiring is left to the judgment of the Board.

Moving to the issue of contracts, Boards of Education need to be sensitive in providing for the possibility of staff reductions to include special provisions in the individual employment contract.

Recently a Michigan Board of Education issued contracts that stipulated that the contract will not be terminated unless there is insufficient revenue to pay salaries, and that 10 days' notice will be given. During the term of the Michigan contract, certain teachers received letters indicating that state aid had been reduced by $300,000, and as such, the district could not operate at a deficit. The letter went on to say that all extracurricular activities were being eliminated and all probationary plus 3 tenured teachers were being released. The nontenured teachers argued that the 10-day notice was insufficient; specifically, that a 60-day notice was necessary prior to the dismissal of nontenured teachers. The courts held that the statute was applicable only to situations where the teacher's livelihood and reputation were at issue, not to layoffs solely due to general economic conditions.

Teacher contracts in states where collective bargaining is a matter of fact must be dealt with in a very sensitive manner. When Board policies become a part of a negotiated contract, there results greater latitude for the Board of Education to deal with reduction in force. Therefore, as Board members, we must maintain a high level of sensitivity when negotiating reduction in force procedures.

In a recent article in the Journal of Law and Education, the following quote is given: "Public sector negotiations remain caught in a maze

of overlapping laws and regulations which frequently contradict each other. Collective bargaining statutes are often established by legislators with little or no effort given to rescinding prior statutes that can apply to some of the same areas as the bargaining laws. Many bargaining statutes are ambiguous or silent on whether statutes that predate the bargaining law retain their force and effect."

It appears that more and more states are moving towards negotiation, and the result is a mandatory union contract between the labor group and the Board of Education. As Board members, we must acquire the knowledge of the current statutes in order to assure that educational programs can be protected; which brings me to the following recommendation, and that is that whenever possible, "selective reduction in force" procedures must be followed. A selective reduction in force will maintain the educational integrity of programs which the community has charged board members with and assure that such programs will be provided to the youth of the community. Selective reduction does not mean arbitrary reduction in force based on who likes whom, but rather, which staff members are qualified to provide specific programs. If we do not have selective reduction in force procedures, we may as well just reduce the last hired employees regardless of the services they may be providing. And let me assure you that when we do this, we become oblivious to the main reasons we were elected to Boards of Education -- to preserve the educational quality and integrity of well established accredited programs.

REDUCTION IN FORCE PROCEDURES

Many school districts throughout the country have established reduction in force procedures and/or provisions for classroom teachers. I will not dwell on these procedures, but rather, take the remaining moments that I have and discuss with you reduction in force procedures for school administrators and classified staff members. The models I will discuss with you at this time reflect the positions on which the Phoenix Union High School District and the Board of Education have agreed.

First, let me summarize the procedures for classified employees:

1. Reduction in force (RIF) will be by job title according to seniority in the District which is by original date of employment under contract.

2. An employee may place his/her name on the seniority list(s) of those job title(s) s/he has held on a permanent basis.

3. An employee who has held only one job title may have his/her name placed on one additional job title seniority list which (a) is comparable, (b) is at the same or lower classification than current job title, and (c) for which s/he is qualified in accord with the qualifications as stated in the job description.

4. Employees will be reassigned and recalled on the basis of seniority.

5. An employee who declines a reassignment or a recall waives further reassignment or recall rights to that specific job title(s).

6. There will be no permanent new hires in any job title where there are employees awaiting recall.

7. Upon reassignment or recall, an employee's name will be removed from other seniority lists.

8. Seniority accrues while waiting recall, and upon recall all rights related to salary and fringe benefits shall be restored.

9. Recall rights will be in effect for six months after the RIF.

The procedures for administrative personnel are summarized as follows:

1. Reduction-in-force will be determined by the total years of service in the district each employee has accumulated within an administrative classification.

2. Based on that seniority, the least senior member of the job classification would be affected by the reduction-in-force.

3. In the event a reduced-in-force administrative employee has served in a lower administrative position, s/he would be eligible to move to the lower position with a cumulative number of years of service from any level above that position,

together with the years of service in that lower position, to determine his/her assignment based on seniority. A prerequisite would be that the reduced-in-force employee would have had to serve in that lower administrative postion in order to be eligible for assignment to the lower position. Additionally, s/he must meet the qualifications of the current job description for that position.

4. Reduced-in-force administrative employees who have earned district teacher tenure and have not received an assignment in an administrative position will have reduction-in-force rights and privileges as follows:

Administrative employees shall retain all the rights of teacher tenure earned as a certificated employee of the district should they be voluntarily or involuntarily returned to a position on the district teachers' salary schedule. An administrative employee will receive credit on the teachers' salary schedule for the cumulative total years of service in the district.

Any teacher who shall be transferred to a supervisory or administrative position and later returns to a teacher status shall be entitled to retain such rights as s/he may have had under these educational policies prior to such transfer to supervisory or administrative status, and to full credit for total experience in the District if such agreement is understood at the time the transfer is made.

5. As vacancies occur, the reduced-in-force administrative employee will have recall rights, based on his/her seniority, up to a period of three years. After being notified and offered an available administrative position, the employee must reply to the Personnel Office within a maximum of two work days. Failure to reply or declining the offer will result in the forfeiture of all rights to recall as an administrative employee.

Finally, I can attest to you that reduction in force is not a pleasant task, but one with which Boards of Education throughout our country will be confronted for the next three to five years. During the past two decades we have been very fortunate in building district programs, staff, facilities, and educational excellence. Our mission today is to adjust to the rapid change in declining enrollment and spiraling inflation -- it will result in reduction in force sometime.

I have not presented a panacea with regard to reduction in force, but rather, have summarized some of the legal implications, and shared with you reduction in force procedures for two classifications of employees which we seldom read or hear about. These of course are the classified and the administrative employees.

Let me leave you with one last thought -- that it is time for us to begin to analyze our results and to begin the rebuilding of our educational systems, much the same as we did during the late 50's and early 60's. We must move beyond just managing the status quo because there will come a time when we will fail to grow, and if

this is the case, we will begin destroying much of what we have built.

Therefore, I challenge each of you to look at reduction in force as a process in determining the priorities of a district, and to maintain the quality and integrity of programs which the community will support, and that we can and will build for the future. Thank you.